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Mohamad bin Deraman v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–38 OF 2001
ZAINUN ALI, SULONG MATJERAIE AND KANG HWEE GEE JJCA
30 NOVEMBER 2010

C

Criminal Law — Murder — Appeal against conviction and sentence — Whether prosecution proved its case against appellant beyond reasonable doubt — Whether trial judge erred in accepting cautioned statement voluntarily given — Whether appellant raised reasonable doubt on case for prosecution — Whether appeal ought to be dismissed

D

Criminal Procedure — Appeal — Conviction and sentence, against — Appellant charged with murder — Whether trial judge handed down decision or mere conclusion that was not a judgment — Whether failure to produce written judgment amounted to serious miscarriage of justice that merited retrial — Whether conviction of appellant safe — Rules of the Court of Appeal 1994 r 61(1)(e)

E

Criminal Procedure — Trial — Trial within a trial — To determine voluntariness of cautioned statement — Whether trial judge erred in admitting cautioned statement

F

Evidence — Statement — Cautioned statement — Voluntariness — Whether cautioned statement properly admitted

G

The appellant and another were charged under s 302 of the Penal Code ('Code') with the murder of one Hj Ismail bin Sulaiman ('the deceased'). At the conclusion of the trial only the appellant was convicted of the charge of murder and sentenced to death. This was the appellant's appeal against that decision. The appellant appealed on the grounds that at the conclusion of the trial, the trial judge had only handed down a decision or mere conclusion and not a judgment. The appellant argued that the trial judge's failure to produce a written judgment as required under r 61(1)(d) of the Rules of the Court of Appeal 1994 ('the Rules') was fatal and could not result in the conviction of the appellant under s 302 of the Code. As such, the appellant contended that this irregularity, which amounted to a serious miscarriage of justice, merited a retrial. The appellant further appealed by claiming that the trial judge had erred in accepting that the cautioned statement was voluntarily given, and in calling

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for the defence despite the failure of the prosecution in establishing a prima facie case against the appellant at the close of the prosecution case. The appellant also argued that the trial judge had failed to accept that the appellant had raised a reasonable doubt on the case for the prosecution. The prosecution insisted that the issue of non-compliance with the requirement of r 61(1)(e) of the Rules did not arise and that a trial within a trial had been conducted to determine the voluntariness of the cautioned statement made by the appellant.

Held, dismissing the appeal:

(1) In evaluating the provision of r 61(1)(e) of the Rules it was found that the trial judge had not offended the said directive but had in fact complied with the said direction. The absence of a written judgment did not automatically render the decision of the trial judge vitiated and that it should not prohibit the court from hearing this appeal without the benefit of grounds of judgment. In the present case it was found that the conviction of the appellant was safe having regard to the overwhelming nature of the case for the prosecution including the duly accepted cautioned statement at the trial within trial, as well as, viva voce evidence of the appellant who admitted to have killed the victim. The basis of the trial judge's decision was clear and the evidence was clearly against the appellant that no reasonable man could possibly have come to any other conclusion except that of clear guilt of the appellant. As such, there had been no substantial miscarriage of justice that merited a retrial (see paras 13, 27, 30, 38 & 44–45).

(2) The cautioned statement was confirmed by the copious voluntary testimonies of the appellant himself. These findings were further reverberated and considered by the trial judge in determining the guilt or otherwise of the appellant at the end of the trial. Based on the facts of this case, it was found that the trial judge was correct in holding that the cautioned statement made by the appellant was made voluntarily and as such the appeal on this ground had no merit (see paras 54–55).

(3) In the instant case, apart from the cautioned statement there was strong circumstantial evidence to support the conviction. Although the evidence against the appellant was largely circumstantial in nature, the inevitable conclusion to be drawn from the overwhelming evidence adduced, taken together with the cautioned statement and the surrounding circumstances, for example the nature of the injuries sustained by the deceased, pointed irresistibly to the conclusion that the appellant had intentionally caused the death of the deceased. Thus the trial judge had not erred in finding that the prosecution had established a prima facie case at the close of the prosecution case (see paras 60, 62, 73 & 79–80).

(4) From the medical analysis there was no sudden fight and the trial judge

was correct to have found that the appellant could not rely on the defence of a sudden fight. The appellant had not succeeded in creating any doubt on the truth of the case for the prosecution. As such his conviction was safe and there was no reason to interfere with the finding of guilt arrived at by the trial judge (see paras 87, 94 & 97).

[Bahasa Malaysia summary

Perayu dan seorang lagi didakwa di bawah s 302 Kanun Keseksaan ('Kanun') dengan pembunuhan Hj Ismail bin Sulaiman ('si mati'). Pada akhir perbicaraan hanya perayu disabitkan dengan tuduhan membunuh dan dihukum mati. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu merayu atas alasan bahawa pada akhir perbicaraan, hakim perbicaraan hanya memberikan keputusan atau kesimpulan semata-mata dan bukan penghakiman. Perayu berhujah bahawa kegagalan hakim perbicaraan untuk mengemukakan penghakiman bertulis seperti yang dikehendaki di bawah k 61(1)(d) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah') adalah serius dan mengakibatkan sabitan perayu di bawah s 302 Kanun. Oleh itu, perayu berhujah bahawa laur aturan ini, yang membangkitkan ketidakadilan serius, mewajarkan perbicaraan semula. Perayu selanjutnya merayu dengan mendakwa bahawa hakim perbicaraan telah tersilap di dalam menerima bahawa penyataan beramaran diberi secara sukarela, dan di dalam memanggil pembelaan walaupun pendakwaan gagal di dalam membuktikan kes prima facie terhadap perayu di akhir kes pendakwaan. Perayu juga berhujah bahawa hakim perbicaraan gagal untuk menerima bahawa perayu telah membangkitkan keraguan munasabah di atas kes pendakwaan. Pendakwaan mendesak bahawa isu ketidakpatuhan dengan kehendak k 61(1)(e) Kaedah tidak berbangkit dan bahawa perbicaraan dalam perbicaraan telah dilakukan untuk menentukan kesukarelaan penyataan beramaran yang dibuat oleh perayu.

Diputuskan, menolak rayuan:

(1) Dalam menilai peruntukan k 61(1)(e) Kaedah didapati bahawa hakim perbicaraan tidak melanggar arahan tersebut tetapi telah sebenarnya mematuhi arahan tersebut. Ketiadaan penghakiman bertulis tidak secara automatik menyebabkan keputusan hakim perbicaraan tidak sah dan ia tidak patut melarang mahkamah daripada mendengar rayuan ini tanpa manfaat alasan penghakiman. Dalam kes ini didapati bahawa sabitan perayu adalah selamat mengambilkira sifat kes yang ketara untuk pendakwaan termasuk penyataan beramaran yang diterima di perbicaraan dalam perbicaraan, begitu juga, keterangan viva voce perayu yang mengaku membunuh mangsa. Asas keputusan hakim perbicaraan adalah jelas dan keterangan secara jelas terhadap perayu bahawa seseorang yang munasabah tidak mungkin boleh mencapai apa-apa keputusan lain kecuali kebersalahan perayu yang jelas. Oleh itu, tidak

terdapat ketidakadilan yang substansial yang mewajarkan perbicaraan semula (lihat perenggan 13, 27, 30, 38 & 44–45).

(2) Penyataan beramaran disahkan oleh keterangan sukarela ketara perayu sendiri. Dapatan-dapatan ini selanjutnya menjadi sebutan dan dipertimbangkan oleh hakim penghakiman di dalam menentukan perayu bersalah atau tidak pada akhir perbicaraan. Berdasarkan fakta kes ini, ia didapati bahawa hakim perbicaraan betul di dalam memutuskan bahawa penyataan beramaran yang dibuat oleh perayu dibuat secara sukarela dan oleh itu rayuan atas alasan ini tidak bermerit (lihat perenggan 54–55).

(3) Dalam kes ini, selain daripada penyataan beramaran terdapat keterangan ikut keadaan yang kukuh untuk menyokong sabitan. Walaupun keterangan terhadap perayu sebahagian besar bersifat keadaan, kesimpulan yang tidak dapat dielakkan yang oleh diambil daripada keterangan ketara yang dikemukakan, diambil bersama dengan penyataan beramaran dan keadaan sekeliling, contohnya sifat kecederaan yang dialami oleh si mati, ke arah kesimpulan yang kukuh bahawa perayu telah berniat untuk menyebabkan kematian si mati. Oleh itu, hakim perbicaraan tidak tersilap di dalam dapatannya bahawa pendakwaan telah membuktikan kes prima facie di akhir kes pendakwaan (lihat perenggan 60, 62, 73 & 79–80).

(4) Daripada analisa perubatan tidak terdapat pergaduhan tiba-tiba dan hakim perbicaraan betul apabila mendapati perayu tidak dapat bergantung ke atas pembelaan pergaduhan tiba-tiba. Perayu tidak berjaya di dalam membentuk apa-apa kesangsian di atas kebenaran kes pendakwaan. Oleh itu sabitannya adalah selamat dan tidak ada sebab untuk campur tangan dengan dapatan bersalah yang diputuskan oleh hakim perbicaraan (lihat perenggan 87, 94 & 97).]

Notes

For cases on appeal against conviction and sentence, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1341–1343.

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 288–331.

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2734–2763.

For cases on trial within a trial, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5467–5474.

Cases referred to

Adzhaar bin Ahmad & Anor v PP [1996] 4 MLJ 85, HC (refd)

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Bejoy Mondal and Ors v State of West Bengal and Ors [1984] Cri LJ 518 (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, FC (refd)
Himachal Pradesh Administration v Shri Om Prakash AIR 1972 SC 975, SC (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406, HC (refd)
Jaafar bin Abu & Anor v PP [1988] 2 MLJ 363, SC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mohamed Kunjo v PP [1978] 1 MLJ 51, PC (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Por Choo Aik lwn Pendakwa Raya [1993] 2 MLJ 131, HC (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v Awang Raduan Awang Bol [2005] 1 CLJ 649, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)
PP v Sharikat Perusahan Makanan Haiwan Berkerjasama2 [1969] 2 MLJ 250 (refd)
Prakash Chand v State AIR 1979 SC 400, SC (refd)
Sabaee bin Bujang v PP [2006] 2 MLJ 627; [2006] 1 CLJ 423, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh v The State of Punjab AIR 1958 SC 465, SC (refd)
Wong Foh Hin v PP [1964] 1 MLJ 149, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 113, 308
Evidence Act [IND] ss 8, 27
Evidence Act 1950 s 8, 8(2)
Indian Penal Code [IND] s 300(3)
Penal Code ss 300(a), (b), (c), (d), 302
Rules of the Court of Appeal 1994 r 61(1)(d), (e)

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of this court.

[2] The appellant before us was convicted of an offence of murder under s 302 of the Penal Code and was sentenced to death by the High Court,

Kuantan, Pahang on 5 July 2001. We heard his appeal against the conviction and sentence and dismissed it. We upheld the conviction and sentence of death imposed on the appellant by the learned High Court judge. We now give the reasons for our decision.

[3] The brief facts relevant to this appeal are as follows. The appellant was charged together with the second accused, Mohd Rosly bin Ismail, for the murder of one Hj Ismail bin Sulaiman at Block 10, Ladang Kelapa Sawit Chini 2, Pekan, Pahang Darul Makmur. At the conclusion of the trial, Mohd Rosly bin Ismail was acquitted and discharged.

[4] Five main grounds of appeal were filed by the appellant. Firstly, the main argument of the appellant rests on the complaint that the learned trial judge failed to produce a written r 61(1)(d) of the Rules of the Court of Appeal 1994 judgment, contrary to the requirement of. Learned counsel for the appellant, Mr Karpal Singh alleged that the 'ruling' made by the learned trial judge on 5 July 2001 was not a judgment as envisaged by r 61(1)(d) of the Rules of the Court of Appeal 1994 but was only a decision. Consequently, it was argued that the non-compliance of the learned trial judge to the first ground of appeal is fatal and cannot result in the conviction of the appellant under s 302 of the Penal Code. In the upshot such failure amounted to a nullity, and not an irregularity, prompting serious miscarriage of justice meriting a retrial. This forms the second ground of appeal.

[5] The third ground of appeal pertains to the alleged error of the learned trial judge in accepting the cautioned statement as an exhibit at P15 after a trial within a trial. The learned trial judge was alleged to have also erred in calling for the defence despite the failure of the prosecution in establishing a prima facie case against the appellant at the close of the prosecution case. This forms the fourth ground of appeal.

[6] The fifth and final ground of appeal was the failure of the learned trial judge to accept that reasonable doubt has been raised by the appellant on the case for the prosecution. All the above mentioned grounds will be dealt with hereunder.

GROUNDS 1 AND 2: ALLEGED FAILURE TO PRODUCE WRITTEN JUDGMENT AS REQUIRED BY R 61(1)(d) OF THE RULES OF COURT OF APPEAL 1994 AND SUCH FAILURE AMOUNTED TO A NULLITY MERITING A RETRIAL

[7] Grounds 1 and 2 are somewhat related and they are dealt with together.

[8] It is observed that learned counsel for the appellant alleged non-compliance with r 61(1)(d) of the Rules of the Court of Appeal 1994. From the bundle of authorities filed by learned counsel, it appears that the said r 61(1)(d) was extracted from a book entitled *Rules of the Court of Appeal 1994 Compiled and Edited by Editorial & Research Dept Central Law Book Corporation Sdn Bhd*. Perusing the said rule, it is noted that it is similar to r 61(1)(e) of the Rules of the Court of Appeal 1994 quoted by the learned deputy public prosecutor. As the wordings of r 61(1)(d) as quoted by learned defence counsel are similar, word for word, to the wordings in r 61(1)(e) as quoted by the learned deputy public prosecutor, we adopted the version from the Chambers of the Attorney General as being authentic. The reason is obvious. Therefore, in our view the correct rule should be r 61(1)(e) of the Rules of the Court of Appeal 1994 and not r 61(1)(d) of the Rules of the Court of Appeal 1994 as alluded to by learned counsel for the appellant. For the purpose of this appeal, our analysis will be based on r 61(1)(e) of the Rules of the Court of Appeal 1994.

[9] We turn initially to the question of written judgment, or rather the 'alleged ruling', as submitted by learned counsel. A few directives have been issued to the members of the judiciary on how a judgment should be written, but it is worthy to note that one directive stands out. It was from the Right Honourable Tun Mohamed Suffian, the then Lord President of the Federal Court. Writing to all judges including Presidents and magistrates on 18 April 1979 the then Lord President chided judges for writing long and protracted judgments. He said, inter alia, that 'brevity is not only the soul of wit; it is also the soul of understanding'.

[10] Tun Suffian said that judges are entitled to write judgments in any way they think fit and added further that judgments are to be written in such a way as to direct the attention of the appellate court to the points in issue, the rulings of the trial court on law and its finding on facts.

[11] Tun Suffian further opined that, '… it should be sufficient if the judge were to state briefly the nature of the evidence to establish the point in issue and his finding on the evidence, with his reasons'. There is therefore, no justification for a judgment to be nearly as long as the evidence itself.

[12] Tun Suffian concludes his direction by saying: 'If attention is focused on identifying the cause of action and setting out in brief (the shorter the form the clearer it will be) the evidence pertinent to the cause of action, and to the conclusion or findings of the court — the strict limits of a judgment — the appellate court will have a simpler task, the 'judges' will have a much easier time, their secretaries will have less to type and costs will be greatly reduced.'

[13] Learned counsel argued that: 'What the learned judge handed down on 5 July 2001 at the conclusion of the trial was not a judgment as required by law Rule 61(1)(d) but only a decision.' With respect we cannot agree with such argument as we are of the view that based on the above mentioned directive of the then Lord President, the learned trial judge has not offended but has in fact complied with the said direction.

[14] It was further alleged by learned counsel that at the close of the prosecution case and after hearing 22 witnesses and offering ten witnesses to the defence and after hearing submissions from both the prosecution and the defence, the learned trial judge concluded that the appellant and his co-accused, Mohamad Rosli bin Ismail, should be called to enter their defence. It was submitted that the learned trial judge came to that conclusion without adverting at all, to the standard of proof on the prosecution to prove a prima facie case after a maximum evaluation of evidence of the prosecution witnesses as required by law.

[15] Two cases were advanced as authorities: *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (FC) and *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 (CA). It may be appropriate to reflect here that these two authorities came very much later and that the learned trial judge could not have had the benefit of the ratio decidendi of these two authorities when he heard this instant case in 1999. Be that as it may, the facts and circumstances of this case, as will be shown later, suggest the appropriateness of a different approach.

[16] While still on the first ground, it was also the submission of learned counsel that there was a complete absence of the phrase 'prima facie' case being mentioned in the conclusion. Neither, it was alleged, was any mention made by the learned trial judge whatsoever on ss 299 or 300 of the Penal Code.

[17] Learned counsel for the appellant submitted further that upon defence being called, including submissions, the learned trial judge in the section of record of appeal in a '35-line 'keputusan' ('decision') found the appellant guilty and acquitted and discharged his co-accused.

[18] Again, it was contended that the learned trial judge failed to advert to the standard of proof on the defence to cast a reasonable doubt on the prosecution case and lamented that as far as the appellant was concerned the 'keputusan' was only 16 lines in length.

[19] Learned counsel argued that learned trial judge was required by law pursuant to r 61(1)(e) of the Rules of the Court of Appeal 1994 to furnish his grounds of decision and submitted that what was handed down by the learned

A trial judge at p 300 of the appeal record does not amount to a written judgment but only a decision and maintained that they are mere conclusions which the learned trial judge arrived at. This, according to learned counsel, is contrary to the decision of Alauddin J (now President Court of Appeal) in *Adzhaar bin Ahmad & Anor v Public Prosecutor* [1996] 4 MLJ 85 who opined that a trial B court is under a statutory duty under s 308 of the Criminal Procedure Code to transmit to the appellate court *the grounds of decision which convey a reasoned judgment on the facts and the law, not merely the conclusion arrived at*. (Emphasis added.)

C **[20]** Another case quoted by learned counsel for the appellant is that of *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346 which held that when writing a judgment, the reasons for the findings should be stated to indicate that the trial magistrate has applied his mind to the evidence produced in the case.

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[21] Learned counsel also alluded to the cases of *Public Prosecutor v Sharikat Perusahan Makanan Haiwan Berkerjasama2* [1969] 2 MLJ 250; *Por Choo Aik lwn Pendakwa Raya* [1993] 2 MLJ 131 and *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406.

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[22] Rule 61(1)(d) and/or (e) of the Rules of the Court of Appeal 1994 have earlier been referred to on many occasions and for easy reference the relevant rules are appended in extenso below:

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> As soon as practicable after the filing of a Notice of Appeal in his Registry, the Registrar of the High Court shall forward to the Registrar of the High Court at Kuala Lumpur particulars of the proceedings in the High Court in Form 7 in the First Schedule together with seven copies of the following papers:
>
> (a) ...
>
> G (b) ....
>
> (c) ....
>
> (d) Where the trial has been with the aid of a jury or assessors a note (verbatim if available) of the charge or summing-up to the jury or assessors;
>
> H (e) where the trial or appeal has been by a Judge alone *a written judgment delivered by the trial Judge or where no such written judgment has been delivered a statement in writing by the trial Judge of the grounds of his decision*. (Emphasis added).

I **[23]** We consider it appropriate to evaluate the provision of r 61(1)(e) of the Rules of the Court of Appeal 1994 in the context of learned counsel's submission.

[24] The deputy public prosecutor is not disputing the allegations of fact by learned counsel but maintained that there was no breach of r 61(1)(e) as there was 'a statement in writing by the learned trial Judge', as envisaged by the said rule, stating the grounds of decision at pp 300–303 of the appeal record. By a letter dated 25 September 2007 from Kuantan High Court it was confirmed that the grounds of judgment have been incorporated into the notes of proceedings. This could be found at the page just before 'Bahagian A' of the appeal record. Paragraph 2 of the said letter said:

> Adalah dimaklumkan bahawa ALASAN PENGHAKIMAN bagi kes tersebut di atas telahpun dirangkumi dalam Nota Keterangan. Oleh yang demikian alasan penghakiman tidak perlu ditulis lagi oleh Y.A Dato' dan adalah seperti di keputusan kes, iaitu di muka surat 300 hingga muka surat 302, Nota Keterangan kes tersebut.

[25] Rule 61(1)(e) clearly states that 'where no such written judgment has been delivered a statement in writing by the trial judge of the grounds of his decision' would suffice.

[26] Therefore the public prosecutor insists that the issue of non-compliance with the requirement of r 61(1)(e) does not arise. We agree because the learned trial judge gave the grounds of his decision in accordance with r 61(1)(e) of the Rules of the Court of Appeal 1994.

[27] The law is clear. The absence of a written judgment does not automatically render the decision of the learned trial judge vitiated and it should not prohibit this court from hearing the appeal without the benefit of grounds of judgment, see *Jaafar bin Abu & Anor v Public Prosecutor* [1988] 2 MLJ 363 (SC). The absence of a written judgment does not at all vitiate the trial which has already taken place.

[28] It has also been argued as ground of appeal No 2 by learned counsel that this court should order a retrial. That suggestion must receive a negative response, as another avenue is still available to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the learned trial judge.

[29] In a criminal case the duty of the appellate court is to ascertain if the conviction is safe and not whether the decision is wrong. See *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389 at p 397.

[30] As can be seen in the latter part of this judgment and from the gruesome aspect of this savage murder, we are fully convinced that the conviction of the appellant was safe having regard to the overwhelming nature of the case for the

prosecution including the duly accepted cautioned statement at the trial within trial as well as viva voce evidence of the appellant who admitted to have killed the victim.

[31] The correctness of the conviction can still be achieved as it is still open to us at the appellate court to review or to re-evaluate the evidence adduced by the prosecution and subject them to a critical re-examination. This power to review or re-evaluate the evidence is the essence of the decision of the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 where Zulkefli Makinudin FCJ, delivering the judgment of the court, said at pp 629–630 (MLJ); 818–819 (CLJ) as follows:

> As regards the first main ground of appeal raised by the appellant, I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from witnesses called by the prosecution as appearing in the appeal record. I am therefore of the view that the Court of Appeal did not err on this issue.

[32] On the facts of this case, we accept and agree with the submission of the learned deputy public prosecutor. It is our view that the appellate court must look at the totality of evidence in the case to determine whether the evidence was reliable or not.

[33] We feel that having regard to this particular case and the evidence brought before the High Court coupled with the admission by the learned trial judge and the cautioned statement of the appellant at P15, there are ample evidence on which a reasonable tribunal, properly directing itself on the evidence available, could have come to the conclusion that it did. As an example, at p 2 of the cautioned statement (P15) the appellant said as follows:

> Lebih kurang 15–20 minit kami berjalan, abang (Haji Ismail bin Sulaiman, ('the deceased')) terus bertanya kepada saya hendak pergi ke mana dan adakah tempat itu jauh lagi. Saya tidak ingat pakaian yang dipakai oleh Abang. Tapi dia memakai seluar panjang serta berbaju. Oleh kerana Abang tidak berhenti-henti bertanyakan

kepada saya, saya telah pandang serong terhadap Abang kerana tidak mempercayai saya, padahal saya hendak menolongnya secara ikhlas.

Semasa Rosli (2nd accused) berjalan di hadapan, Abang di tengah dan saya di belakang. Saya telah takir abang dari belakang dengan menggunakan golok yang saya bawa. Saya takir pada bahagian tengok abang. Saya takir sekali saja. Abang rebah, saya tidak tahu mati atau tidak. Rosli tanya saya apa jadi, saya beri tahu saya telah takir. Saya heret abang masuk ke dalam ladang kelapa sawit. Saya tarik lebih kurang 20 kaki, saya rasa penat. Saya memberitahu Rosli supaya menarik. Setelah jauh dari jalan, saya bertanya kepada Rosli Abang dah mati atau belum. Rosli juga ta tahu, saya menyuruh Rosli tikam bahagian rusuk abang 2 kali. Saya tidak nampak darah keluar banyak ke sikit. Saya agak Abang telah mati. Rosli ada memberitahu saya dia ada ambil beg duit abang dan duit dalam beg sebanyak RM250.00–RM300.00 Saya tutup mayat abang dengan pelepah kelapa sawit yang telah kering. Saya tutup gitu-gitu saja. Setelah itu kami meningalkan tempat itu pergi ke lori. Semasa dalam perjalanan ke lori saya meminta golok dari Rosli. Kedua-dua bilah golok ini saya simpan di belakang kusyen lori. Kami terus pergi ke rumah Mat Jelani.

[34] A trial within trial was conducted by the learned trial judge, to determine the voluntariness or otherwise of the cautioned statement (P15). After hearing the various witnesses the learned trial judge ruled that the cautioned statement (P15) was given voluntarily and was therefore admissible in evidence.

[35] It is crystal clear that the appellant killed the victim when he said at p 3 of P15:

Saya takir abang (the deceased) dari belakang dengan menggunakan golok yang saya bawa. Saya takir pada bahagian tengok abang. Saya takir sekali saja. Abang rebah, dan saya tidak tahu mati atau tidak. Rosli tanya saya apa jadi, saya beri tahu saya telah takir. Saya heret abang masuk ke dalam ladang kelapa sawit. Saya tarik lebih kurang 20 kaki, saya rasa penat.

[36] When his defence was called, the appellant, at p 229 of the appeal record para E, again confirmed that he killed the victim when he gave evidence under oath as follows:

Masa itu saya rasa marah sebab dia tak dengar kata kita yang nak tolong dia. Dia marah kita balik. Saya pun marah. Saya kata 'Mu tak reti orang royak. Dengarlah orang royak.' Saya pun tarik golok dan hayunkan. Jadi kenalah dia. Dia rebah.

Lepas dia rebah saya pun tarik dia ke dalam rak kelapa sawit.

Masa saya hayun golok itu Rosly berada di depan. Rosly tak cakap apa-apa sebelum saya hayun golok. Selepas Abang tumbang Rosly tanya 'Apa ini'.

[37] It can also be seen that Rosly was not directly involved in the murder of the deceased.

[38] The basis of the High Court judge's decision was clear and such decision was to be expected based upon the evidence adduced when it was ruled that defence be called. The learned trial judge at p 222 of the appeal record said:

> Saya berpuas hati terdapat bukti yang cukup tentang berlakunya suatu pembunuhan pada tarikh, masa dan tempat yang dinyatakan dalam pertuduhan P2. Mangsanya dikenalpasti sebagai Hj Ismail bin Sulaiman. Telah juga dibuktikan senjata-senjata yang menyebabkan kematian serta kecederaan yang terdapat pada mayat si mati. Terdapat keterangan yang jelas bahawa kedua-dua tertuduh adalah orang yang terakhir bersama si mati semasa hayatnya dan mereka juga orang yang di dalam miliknya senjata yang mencederakan si mati itu berada sejurus sebelum dan selepas kematian. Tindak tanduk terduduh berdua sebelum dan selepas kematian membangkitkan inference yang tidak dapat ditolak bahawa mereka bersama dengan niat urusan bersama untuk membunuh telah menyebabkan kematian tersebut. Keterangan-keterangan boleh diterima saksi-saksi pendakwa didapati credible dan menunjukkan pembuktian semua ingredian pertuduhan walaupun tanpa penerimaan P15 yang nyata menguatkan lagi kes pendakwaan bahawa kedua-dua tertuduhlah yang bersama bertanggungjawab atas pembunuhan Hj Ismail itu.
>
> Dengan itu pembelaan kedua-dua perlu dipanggil dan dengan itu mereka dipanggil membela diri atas pertuduhan P2.

[39] When defence was called and the appellant elected to testify on oath. At pp 228–229 of the appeal record, the appellant said in evidence as follows:

> Dia tanya Rosly dia tanya saya kita ini nak gi mana. Dia rasa terlalu jauh dia kata 'Kita ini bukan main jauh dah'. Saya kaa 'Kita nak cari adik awak, kita masuk perkampungan orang Asli ini'. Saya beritahu dia saya tahu di tempat orang Asli malam itu ada dibuat disco rimba. Tempat dia berjoget malam itu. Abang itu kata tempat begitu bukan nak cari anak dia, nak pergi disco rimba.
>
> Saya kata 'kita masuklah dulu. Saya tahulah tempat saya kerana ladang itu tempat saya ambil buah'. Dia marah kepada saya. Dia kata kalau tempat begitu bukan nak cari adik dia. Saya dengar nada suara dia tinggi marahkan saya. Saya kata 'kita masuk tengok dulu. Saing-saing saya pun ada dalam tu. Saya kenal'. Dia tak berapa nak percaya kepada saya. Dengan cara dia, dia marahkan saya.
>
> Masa itu Rosly berjalan di depan. Percakapan Abang dengan saya kuat. Saya tak perasan berapa jauh Rosly di depan sebab malam. Lebih kurang dari sini ke pintu (saksi tunjuk jarak 10'). Jarak antara saya dengan Abang lebih kurang 5'. Kalau tak silap saya Rosly kata 'Ikut ajalah try di perkampungan orang Asli'. Abang itu tak berapa nak percaya saya. Dari percakapannya macam dia marahkan saya. Dia memang kecek dia 'Sini bukan, tempak nak cari adik saya'. Saya kata ' Awak kena dengar orang royak dulu'. Lepas itu dia marah saya balik. Dia tak nak ikut. Kalau macam ini dia kata 'baliklah'.

Masa itu saya rasa marah sebab dia tak dengar kata kita yang nak tolong dia. Dia marah kita balik. Saya pun marah. Saya kata 'Mu tak reti orang royak. Dengarlah orang royak'. Saya pun tarik golok dan hayunkan. Jadi kenalah dia. Dia rebah.

Lepas dia rebah saya pun tarik dia ke dalam rak kelapa sawit.

Masa saya hayun golok itu Rosly berada di depan. Rosli tak cakap apa apa sebelum saya hayun golok. Selepas Abang tumbang Rosly tanya 'Apa ini'.

[40] Clearly from the facts, there are copious testimonies from the appellant personally that he swung the machete and struck the victim. The deceased fell. The appellant killed the deceased. The appellant later dragged the body of the deceased between the oil palm trees. There is an all self explanatory testimony to show that the appellant murdered the deceased.

[41] On the facts of this case the ingredients of the offence of murder are before the court. The admission of the appellant is one of them. Thus the deputy public prosecutor argued as to why there is any need for the learned trial judge to determine if the prosecution has made out a prima facie case against the appellant when the appellant has made out a clear and unambiguous admission?

[42] The learned trial judge was satisfied at para C onwards at p 222 of the appeal record that a murder took place at the date, time and place found in the charge. At para F of the same page the learned trial judge said:

Keterangan-keterangan boleh diterima saksi-saksi pendakwa didapati credible dan menunjukkan pembuktian semua ingredian pertuduhan walaupun tanpa penerimaan P15 yang nyata menguatkan lagi kes pendakwaan bahawa kedua-dua tertuduhlah yang bersama bertanggung jawab atas pembunuhan Hj Ismail itu.

[43] It is clear that the learned trial judge has analysed the evidence of the prosecution.

[44] The evidence was so clearly against the appellant that no court using the standard of any reasonable man could possibly have come to any other conclusion except that of clear guilt of the accused.

[45] We are of the view that no substantial miscarriage of justice has occurred and pursuant to the proviso of s 60 of the Courts of Judicature Act 1964 ground of appeal No 1 is hereby rejected. As indicated earlier, the ground of appeal No 2 is similarly refused.

THIRD GROUND OF APPEAL: THE ALLEGED ERROR OF THE LEARNED TRIAL JUDGE IN ACCEPTING THE CAUTIONED STATEMENT AS AN EXH P15 AFTER A TRIAL WITHIN TRIAL TO DETERMINE THE VOLUNTARINESS OR OTHERWISE OF STATEMENT ID15

[46] The prosecution made use of the appellant's cautioned statement P15 to implicate him with the murder.

[47] A viva voce trial was conducted to determine the question of voluntariness of the cautioned statement. Voluntariness or otherwise of any cautioned statement is simply a question of fact.

[48] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 249, Hashim Yeop A Sani J (as he then was) opined:

> It is difficult to draw clear guidelines on what the court should do in all cases where a question arises as to the voluntariness of a statement of an accused person. Facts differ from case to case. In the ultimate analysis each case has to be determined on its own merits. It has been accepted as sound principle that even where circumstances have been shown by the defence which opened a statement to serious criticism and thereby bring its voluntariness gravely into question the court could still hold that a statement is voluntary if after appreciating the importance and significance of those circumstances the court can find that there are other facts and circumstances to completely assure the voluntariness of the statement. This principle is referred to in *Irfan Ali v State* [1970] Cr LJ 603.

[49] A trial within a trial was conducted in the instant case to determine the voluntariness of the cautioned statement made by the appellant. Based on the evaluation of the evidence of SPT1 (ASP Kamarudin bin Mohd Zakaria), SPT2 (Jumani bin Warsian), SPT3 (ASP Mansor bin Hussain), SDT1(Mohamad bin Deraman — the appellant) and SDT2 (Mohd Rosly bin Ismail — the second accused) and the evidence in rebuttal ie from SPT4 (DSP Roslan bin Ahmad G5950) and SPT5 (Det L/Cpl Mohd Yusof bin Ismail: DL/K 89744) the learned trial judge made a finding of fact that the cautioned statement was voluntarily given. At p 207 the learned trial judge said:

> Didapati ID15 tanpa apa-apa keraguan telah diberi dengan sukarela oleh tertuduh pertama. Apa-apa yang dibangkitkan oleh tertuduh didapati sematamata tomahan (sic) dan tanpa asas yang boleh dipercayai. Dengan itu ID15 diterima sebagai sebahagian daripada keterangan.

[50] The learned trial judge found without any doubt that the cautioned statement ('ID15') was voluntarily given by the appellant. The learned trial

judge said that whatever was raised by the appellant that he was punched, slapped, kicked and asked to chew slippers and shoes were unsubstantiated allegations which cannot be believed. As such ID15 was admitted as part of the evidence.

[51] If the learned trial judge is satisfied that there was no threat, inducement or promise used on the appellant, the statement made at P15 was made voluntarily.

[52] It is also settled law that if the learned trial judge had made a finding that the cautioned statement was voluntarily given, there is no reason for this court to disturb his finding of facts. This is because voluntariness of a cautioned statement is a question of fact, see *Sabaee bin Bujang v Public Prosecutor* [2006] 2 MLJ 627; [2006] 1 CLJ 423 (CA). The learned trial judge was in a better position to determine the voluntariness of the statements given the fact that he has seen the witnesses giving evidence and how they responded to the questions raised during cross-examinations.

[53] Learned counsel argued that there was 'no discussion on the evidence in the trial within trial, relating to the reasons why P15 was held to be admissible'. The learned trial judge has already said that without any doubt he found that ID15 was given voluntarily. Allegations raised were without any basis and cannot be believed.

[54] With respect, we disagree with the submission of learned counsel and rule that the cautioned statement was confirmed by the copious voluntary testimonies of the appellant himself. These findings were further reverberated and considered by the learned trial judge in determining the guilt or otherwise of the appellant at the end of the trial. At p 300, the learned trial judge said:

> Dengan pengakuan tertuduh pertama sendiri di mahkamah, dari keterangan saksi-saksi pendakwa dan dengan pengakuan dalam P15 adalah tidak diragukan bahawa satu homisid salah telah dilakukan oleh tertuduh pertama yang mengorbankan nyawa mangsa pada tarikh dan masa yang dinyatakan dalam pertuduhan P2. Dakwaan tertuduh pertama yang tidak berniat membunuh dan tetakan parang olehnya itu adalah akibat pergaduhannya dengan mangsa yang dikatakan telah mencurigai keikhlasannya untuk menolong mencari adiknya adalah sukar untuk diterima sebagai tindakan yang wajar dan munasabah. Dan dalam apa keadaan jua pun tidak boleh diterima sebagai memberi hak kepadanya untuk bertindak begitu kejam terhadap mangsa sedangkan dia sedar akibat perbuatannya dengan senjata sedemikian. Keadaan ini tidak tergulung dalam Pengecualian 4 di bawah s 300 KK.
>
> Sebaliknya tindak-tanduk tertuduh pertama sebelum dan selepas kejadian seperti dihujah oleh pendakwa jelas menunjukkan niatnya untuk menghapuskan mangsa dengan tujuan melarikan anak-anaknya SP3 dan SP9 ke Kelantan untuk dijual. Oleh itu saya dapati tertuduh pertama telah melakukan kesalahan membunuh.

[55] Based on what had been deliberated earlier and on the facts of this case, we are satisfied that the learned trial judge was correct in holding that the cautioned statement made by the appellant at P15 was made voluntarily and as such the appeal on this ground has no merit and is also rejected.

GROUND OF APPEAL NO 4 — THE LEARNED TRIAL JUDGE ERRED IN CALLING FOR THE DEFENCE DESPITE THE FAILURE OF THE PROSECUTION IN ESTABLISHING A PRIMA FACIE CASE AGAINST THE APPELLANT AT THE CLOSE OF THE PROSECUTION CASE

[56] Learned counsel argued the complete absence of the phrase prima facie case being mentioned in the judgment of the learned trial judge. The phrase 'prima facie case' was defined in *Mozley and Whiteley's Law Dictionary*, (11th Ed) as: 'A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.' This definition was approved by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. At p 315 (MLJ) and p 100 (CLJ) Augustine Paul JCA added:

> ... the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.

[57] Further the learned judge said at p 316 (MLJ) and pp 100–101 (CLJ):

> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[58] As stated by the learned judge in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215 at p 63 (MLJ) and p 275 (CLJ): A

> A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. B

[59] The evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. C

[60] This exercise must be done at the close of the case for the prosecution by conducting a maximum evaluation of the credibility of witnesses before the court can rule that a prima facie case has been made out. As indicated earlier learned counsel for the appellant submits that in the instant case the learned trial judge erred in calling for the defence although the prosecution failed to establish a prima facie case against the appellant at the close of the prosecution case. D

E

[61] What are the ingredients to be proved in a murder charge under s 302 of the Penal Code? It is lucidly explained by Vivian Bose J in the leading case of *Virsa Singh v The State of Punjab* AIR 1958 SC 465. He outlines at p 467 the elements to be fulfilled in order to bring a case under cl 3 of s 300 of the Indian Penal Code (which is in pari materia with cl (a) of s 300 of the Malaysian Penal Code) as follows: F

> To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 'thirdly';
>
> First, it must establish, quite objectively that a bodily injury is present; G
>
> Secondly, the nature of the injury must be proved; these are purely objective investigations;
>
> Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. H
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. I
>
> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention even to cause an injury of a

kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

[62] In the instant case, apart from the cautioned statement (P15), there are strong circumstantial evidence to support the conviction as follows:

(a) The appellant and the second accused were the last persons seen together with the deceased who was alive then, leaving the squatter house at about 11pm on 31 January 1999 as seen from the testimonies of SP3, Yulianti bt Ismail (daughter of the deceased) and SP9 Kurniadewi bt Sudirman (adopted daughter of the deceased).

(b) The appellant and the second accused wanted to sell SP3 and SP9 in Thailand as prostitutes.

(c) SP11, Aminudin bin Mohamed testified that he saw SP3 and SP9 with the appellant and second accused before they were taken away in a lorry from the squatter house.

(d) The appellant and the second accused told SP3 and SP9 about three hours later that they killed their father (the victim) and they would do the same to SP3 and SP9 if they resisted.

(e) SP4, Ahmad bin Jalaini testified the appellant borrowed his lorry and there was a 'parang' (P7) inside the lorry. Exhibit P7 was later returned to him with blood stain. Another 'parang' (P8) with blood stain was also passed to him and he did clean both 'parangs'. Exhibit P8 was returned to the appellant when he returned the rented car while exh P7 was handed over to the appellant at his house in Tanah Merah, Kelantan in the presence of the second accused.

(f) SP4, Ahmad bin Jalaini also testified that the appellant told him that he (the appellant) had killed someone.

(g) SP10 Nik Aminah bt Mohd Yassin, the wife of the appellant wrapped exhs P7 and P8 before the exhibits were handed to the appellant. The appellant then buried the exhibits ('parangs' used by the appellant and the second accused in the crime) underground his house.

(h) SP12, Inspector Liau Yu Ten was in the arresting party and he testified that both accused tried to hide themselves when SP12 tried to effect an arrest, to an extent that when they refused to open the door despite the

police identifying themselves by saying 'Polis, buka pintu'. The back door and the door to one of the rooms where they were hiding had to be broken down.

(i) The identification parade conducted by SP14 Det L/Kpl 85711 Yusof bin Mohamad proved positive on the appellant and the second accused where SP3 and SP9 could identify them without fail.

(j) SP6, Nala bin Mat, a rubber tapper testified that he saw the deceased's dead body in the estate with cut wounds and he contacted the police.

(k) SP5, Dr Abdul Karim bin Tajudin, a forensic pathologist testified that the cause of death is 'massive bleeding to slash wound' and that exhs P7 and P8 were the weapons that could have caused those injuries. He was not challenged on this. The death was caused by the slash wound found at the neck which was sufficient in the ordinary course of nature to cause death. There was no defensive injury seen on the body of the deceased. It was only probable that someone attacked the deceased from the back. Taken all the evidence in its entirety, the appellant's cautioned statement, exh P15 indeed serves as collaboration to the evidence adduced thus far.

(l) SP7, Mamat bin Awang, another rubber tapper was the first who rendered help to SP3 and SP9 to escape from the clutches of the appellant and the second accused.

(m) SP3 and SP9 were with their captors for almost two days, ie from the time they entered the car driven by the appellant and the second accused until they managed to escape to SP7's house.

(n) SP20, Rusli bin Sapie, lorry driver was led by the appellant to his house in Tanah Merah, Kelantan. P7 and P8 were then recovered from his house.

The act of pointing out the exhibits is relevant and admissible under s 8(2) of the Evidence Act 1950; see *Prakash Chand v State* AIR 1979 SC 400 — Chinnappa Reddy J said at p 404: '... For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under s 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v Shri Om Prakash* AIR 1972 SC 975.'

Even though the statements made by the accused were not recorded, the fact that the accused led the police to the tank and brought out the stolen

articles from inside the tank is relevant under s 8 of the Evidence Act; see *Bejoy Mondal and Ors v State of West Bengal and Ors* [1984] Cri LJ 518 at p 520.

(o) SP21 ASP Kamarudin b Mohd Zakaria, recorded the cautioned statement (P15) under s 113 of the Criminal Procedure Code of the appellant and it was ruled admissible by the learned trial judge. In P15, the appellant admitted that he killed the deceased and wanted to sell SP3 and SP9 in Thailand.

INTENTION

[63] There are numerous cases on the issue of intention and its co-relation with the injuries caused. In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, Raja Azlan Shah FJ (as His Royal Highness then was) said:

> Section 300 of the Penal Code defines murder as follows. Except the cases hereinafter excepted, culpable homicide is murder, if the act by which death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

[64] It was added further stressed that:

> Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily caused death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is the question of degree of probability. … Speaking generally, if the act must in all probability cause death, the offence is within s 300.

[65] In the instant case, the evidence of SP5, Dr Abdul Karim bin Tajudin, the forensic pathologist is very significant and damning. During examination-in-chief SP5 said at p 29 of the appeal record:

> Hasil pemeriksaan luaran saya dapati adanya kecederaan seperti berikut —
>
> 1. Luka calar di dahi kanan berukuran 3 x 2 cm.
> 2. Luka robek pada bibir atas berukuran 3 x 2 cm.

3. Luka tetak pada leher kanan berukuran 14 x 10 cm.

   Luka ini memotong vein jugular luar dan dalam dan juga memotong arteri carotid dan otot-otot leher.

4. Luka seret pada dada kanan berukuran 17 x 15 cm.

5. 2 luka tikam pada rusuk kanan belakang pada paras pinggang berukuran 5 x 30 mm dan 3 x 40 mm.

6. Luka tikam pada rusuk kiri belakang separas pinggang berukuran 4 x 20 mm.

Saya telah melakukan pemeriksaan dalaman. Saya dapati kulit kepala baik. Tulang tengkorak tidak retak atau patah. Selaput otak baik. Otak baik.

Saya lanjutkan permeriksaan di bahagian kena tetak di leher. Saya dapati ia memotong otot-otot leher sebelah kanan vein jugular luar dan dalam, memotong arteri carotid, kemudian memotong tulang rawan kerongkong dan juga tulang leher yang separas dengan epiglottis. Organ-organ lain saya tak periksa.

Saya buat kesimpulan seperti berikut. Terdapat kesan tetak pada leher kanan yang memutuskan vein dan arteri yang boleh membuat keluarnya darah dengan banyak dan menyebabkan kematian. Sebab kematian ialah pendarahan massive akibat luka tetak. (Emphasis added.)

[66] Upon being shown exhs P5F, G, I, J, K and C, Dr Abdul Karim bin Tajudin who is also the Head of the Department of Pathology, Kuala Terengganu Hospital added at p 31 of the appeal record as follows:

Inilah luka tetak yang saya maklumkan tadi. Kecederaan tersebut boleh disebabkan satu benda yang agak panjang, tajam dan berat. Daripada luka tersebut saya anggarkan ia akibat sekali tetak. (Emphasis added.)

[67] When ID7 and ID8 were shown to SP5, the witness replied at pp 31–32 of the appeal record:

Kedua-dua parang ini boleh menyebabkan luka tetakan itu. Hujung kedua-duanya boleh menyebabkan luka tersebut.

... Melihatkan tiada luka tangkis saya anggap serangan di leher ialah yang pertama yang menyebabkan dia tidak dapat melawan. Luka tikam itu dibuat kemudian.

... Saya lebih condong mengatakan mangsa diserang sewaktu dia tidak sedar penyerang itu datang. Dia diserang mengejut, iaitu dia tak nampak. Kalau dia nampak tentu dia member reaksi.

[68] When the said witness was cross-examined, his reply at p 34 of the appeal record was:

Si mati diserang secara *surprise* iaitu dia tidak sedar datangnya serangan.

[69] In the present appeal the evidence of the forensic pathologist shows that the slash wound on the right side of the neck of the deceased cuts the artery and vein causing massive blood loss resulting in the death of the deceased. The forensic pathologist further confirmed that the said slash wound was the result of one hacking only and that ID7 and ID8 could have been the instruments used to cause such wound.

[70] The law on circumstantial evidence is well settled. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, the Federal Court said that:

> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 (at p 310); [1982] CLJ (Rep) 130.

[71] In *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307, Thomson CJ observed:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[72] In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together must point only to the guilt of the accused and it must not be capable of any other interpretation or any other meaning. The prosecution must prove the case beyond reasonable doubt.

MOTIVE

[73] Motive does not constitute an element to be proved for an offence of murder. However, motive tells the reason a person does a particular act. More so, if the evidence is circumstantial in nature, the motive serves as corroboration to the facts in issue which can be considered together with other evidence which would tend to show if the appellant had the pre-requisite intention to kill. In the instant case, the evidence of motive will go to prove

their malice aforethought and has high evidential value, in as much as it is more probably that the deceased was killed to facilitate the selling of SP3 and SP9.

[74] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101 (FC) at p 282 (MLJ); p 122 (CLJ) said:

> Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against an accused so charged.

[75] In *Wong Foh Hin v Public Prosecutor* [1964] 1 MLJ 149 at pp 150–151, the Federal Court held:

> Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact … Strong and convincing evidence of motive will probably have a high evidential value in all circumstances, but that must be especially so in a case like this, where there is only circumstantial evidence of the murder itself.

[76] In order to succeed in proving that prima facie case has been made out against the appellant, the prosecution must prove every ingredient of the crime charged that is to say the deceased has died; that the death of the deceased was caused by the act of the appellant and that the act was done with the intention as required by s 300(a) and (b) of the Penal Code or circumstances as outlined in sub-ss (c) and (d) thereof.

[77] The learned trial judge found that the deceased was identified as Hj Ismail bin Sulaiman when he said at p 222 of the appeal record as follows:

> Saya berpuas hati terdapat bukti yang cukup tentang berlakunya suatu pembunuhan pada tarikh, masa dan tempat yang dinyatakan dalam Pertuduhan P2. Mangsanya dikenalpasti sebagai Hj. Ismail b. Sulaiman.

[78] The learned trial judge also found:

> Terdapat keterangan yang jelas bahawa kedua-dua tertuduh adalah orang yang terakhir bersama si mati semasa hayatnya dan mereka juga orang yang di dalam miliknya senjata yang mencederakan si mati itu berada sejurus sebelum dan selepas kematian.

[79] The inevitable conclusion to be drawn from the overwhelming evidence adduced thus far taken together with the cautioned statement and the surrounding circumstances for example the nature of the injuries sustained by the deceased, the time and place of the incident, the cumulative effect of all those evidence points irresistibly to one and only conclusion that the appellant had intentionally caused the death of the deceased.

[80] There is therefore no merit in ground 4 of the appeal.

GROUND 5 — WHETHER THE LEARNED TRIAL JUDGE WAS WRONG IN NOT ACCEPTING THE APPELLANT'S DEFENCE WHICH HAD RAISED A REASONABLE DOUBT ON THE PROSECUTION CASE

[81] The defence raised by learned defence counsel, Encik Ramli Che Isa at the trial before the High Court was that although the appellant admitted to have slashed the deceased, it was not done intentionally and that motive was absent. As motive has been discussed earlier in this judgment there is no necessity to repeat it here although it is more probable that the deceased was killed to facilitate the selling of his daughters, SP3 and SP9 as prostitutes in Thailand.

[82] The stand taken by the defence was that the annoyance of appellant was provoked by the ungrateful and indignant behaviour of the deceased who questioned the appellant's motive and alleged sincerity in searching the sister. There was an allegation of a sudden fight between the appellant and the deceased. Bitterly resenting such behaviour, the appellant swung his machete at the deceased and struck him at a fatal point causing the death of the deceased.

[83] It was further submitted that the appellant was flustered and confused and kept quiet for 20 minutes and uttered 'Sudahlah, habislah'. Such being the case, it was argued that he had no intention of killing the deceased. However the appellant's testimony suggests otherwise at p 230 of the appeal record the appellant said at lines D–E:

> Rosly kata dia ambil duit itu selepas saya tarik Abang. Lepas itu saya tanya Rosly, 'Mati dah ke hidup lagi'. Rosly kata tak tahu. Lepas itu saya suruh Rosly tengok duit ada banyak mana. Rosly kata tak tahu, tak Nampak.

[84] The test of a 'sudden fight' was clearly laid by the Federal Court in *Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649 where Abdul Hamid Mohamad FCJ (as he then was) in delivering the judgment of the court referred to and followed the Privy Council case of *Mohamed Kunjo v Public Prosecutor* [1978] 1 MLJ 51. The test is: there must be sufficient evidence upon which a reasonable tribunal could have reasonably concluded that the defence of sudden fight was made out.

[85] Was there such evidence? We find none. There was no sudden fight. In fact according to the forensic pathologist, Dr Abdul Karim bin Tajudin at p 32 of the appeal record:

Saya lebih condong mengatakan mangsa diserang sewaktu dia tidak sedar penyerang itu datang. Dia diserang mengejut, iaitu dia tak nampak. Kalau dia nampak tentu dia memberi reaksi.

Susah saya nak jawab bagaimana keadaan mangsa semasa ditetak. Tetapi melihat keadaan luka saya lebih condong mengatakan dia dalam keadaan duduk kerana mangsa dalam kedudukan lebih rendah daripada penyerangnya.

[86] At p 34 of the appeal record he continued:

Si mati diserang secara surprise iaitu dia tidak sedar datangnya serangan. Tidak ada tanda yang menunjukkan si mati telah pengsan apabila diserang.

[87] From the medical analysis given, it is clear that there was no sudden fight. The deceased was taken by surprise and contrary to the testimony of the appellant, the forensic pathologist is more inclined to say that the deceased was sitting down when he was hacked. It is not possible for a person to fight whilst sitting down.

[88] To succeed in the defence of a 'sudden fight', it must be shown that the appellant had not taken undue advantage or acted in a cruel manner against the deceased. On the contrary, the appellant was the one who took advantage of the deceased when, according to SP5, the forensic pathologist, the appellant took the deceased by surprise.

[89] The appellant failed in both tests enunciated in *Public Prosecutor v Awang Raduan Awang Bol*. It is abundantly clear from the evidence that the appellant had brought the deceased to the *orang asli*'s estate in the wee hour of the morning to search for the sister of the deceased. Of all the places, the appellant wanted to bring the deceased to the disco rimba (jungle discotheque). He was armed with machete as opposed to the deceased who was unarmed.

[90] The deceased merely asked the appellant and the second accused at p 228–F of the appeal record: 'Kita ini nak gi mana? Kita ini bukan main jauh dah.' Our translation: 'Where are we going? We have gone so far already.' When the appellant told the deceased that they are going to the disco rimba of *orang asli* said at p 229–A of the appeal record: '... tempat begitu bukan nak cari anak (sic) dia, nak pergi disco rimba.' (Our translation: this is not the sort of place to look for my sister; this is a place for jungle discotheque). The deceased, understandably, refused to go into the discotheque and wanted to go back. The appellant was angry and said at page 229–E:

Masa itu saya rasa marah sebab dia tak dengar kata kita yang nak tolong. Dia marah kita balik. Saya pun marah. Saya kata 'Mu tak reti orang royak. Dengarlah orang

royak'. Saya pun tarik golok dan hayunkan. Jadi kenalah dia. Dia rebah. Lepas dia rebah saya pun tarik dia ke dalam rak kelapa sawit.

[91] It appears to us that just because the deceased refused to go into the jungle discotheque and wanted to go home, the appellant brutally slashed him and then dragged his body in between the oil palm trees. Merely not wanting to go into the discotheque as it was not the place to search for his sister, is no justification for the appellant to have killed the deceased.

[92] It will be recalled that the appellant dragged the body of the deceased and covered it with 'pelepah kelapa sawit'. He also asked for the two machetes from the second accused and kept them behind the cushion of the lorry.

[93] Despite all what the appellant claimed to be we are of the view that he was a cool and calculated criminal who murdered the deceased. His mind was clear and he knew what he was doing.

[94] We are satisfied that the learned trial judge was correct in finding the evidence adduced by the prosecution. The appellant, in our considered view has not succeeded in creating any doubt on the truth of the case for the prosecution.

[95] In view of the circumstantial evidence and the overwhelming evidence adduced, any reasonable tribunal hearing this appeal would have come to the conclusion that the appellant, and no one else, was responsible in causing the death of the deceased.

[96] We have very carefully gone through and scrutinised the appeal record and all the evidence, both the prosecution and the defence, more than several times in order to ensure that no injustice may be done to the appellant.

[97] We have tried to view the evidence in as favourable a manner to the appellant as we reasonably could and with care. We have inevitably come to the same conclusion that the appellant was guilty of the murder for which he was tried. We are satisfied beyond reasonable doubt that the conviction of the appellant is safe. As such we find no reason to interfere with the finding of guilt arrived at by the learned trial judge.

[98] For the reasons outlined above, the appeal is hereby dismissed and the conviction and sentence imposed by the learned trial judge are affirmed.

Appeal dismissed.

Reported by Kohila Nesan